

**HEARING BEFORE THE UNITED STATES SENATE COMMITTEE ON
COMMERCE, SCIENCE AND TRANSPORTATION**

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Chairman Wicker, Ranking Member Cantwell, and distinguished members of the Committee, thank you for the opportunity to submit this testimony in connection with today's hearing. This week, I will conclude my six-year tenure as president of The Ohio State University. It has truly been an honor to serve the students, faculty, staff and supporters of the Buckeye community. I am proud of what we have collectively accomplished at Ohio State and am confident the institution will continue to be a leader in research, medical innovation and academic excellence. For the last year, I have also had the honor of serving as chair of the NCAA Board of Governors, the highest-ranking governing body within the NCAA governance structure. On behalf of the NCAA Board of Governors, I would like to thank the Committee for holding this hearing to discuss the important issue of name, image and likeness.

While it might not be a surprise that I have been intimately involved with college sports throughout my career in higher education, many are not aware of my personal connections to intercollegiate athletics. My father was an avid athlete and was a defensive lineman and captain of the 1933 Morgan State football team, which won the Colored Intercollegiate Athletic Association Championship. My younger son ran cross country and track at Stanford University and was an All-American athlete in both sports. He ended up running in a two-time national championship program, and that was a dream come true. If you show great promise at a young age, one of the most prominent avenues forward is to go to a great college that has a great athletic program. That is the American collegiate model of sports. Through my personal and professional experiences, I have witnessed first-hand the tremendous impact that this uniquely American phenomenon has had on students and their families, institutions of higher education and communities throughout this country. While not perfect, intercollegiate athletics is worth preserving and its evolution should be guided by its long-standing values of education, opportunity, well-being and fairness.

Despite the intrinsic benefits and value college sports provides to participants and the higher education community, it is apparent that the NCAA and its member schools must do more to meet the needs of the 21st-century student-athlete. In recent years, NCAA members have further supported student-athletes by increasing scholarships to cover full cost of attendance, extending the coverage of medical expenses and providing unlimited meals. While these are significant steps toward improving the overall experience of student-athletes, leaders in higher education must continue to evolve without compromising the values that make college athletics unique and so beneficial to diverse students from throughout the world. As directed by the NCAA Board of Governors, the most recent initiative has focused on modernizing

rules related to a student's ability to be compensated for use of their name, image and likeness. I look forward to discussing the important steps that have and will be taken to further support NCAA student-athletes.

The Modernization of Opportunities Related to Student-Athlete Name, Image and Likeness

The issue of student-athlete name, image and likeness (NIL) is complex and nuanced. With the effusion of recent technological and social media advances, it has garnered increasing attention by many in the Association, the public and legislators across the country. In spring 2019, interest in this issue heightened with the introduction of federal and state legislation which would permit student-athletes to be compensated for the use of their NIL. These proposals expressly prohibited the NCAA from enforcing rules that restrict the use of a student's NIL and compensation provided by third parties. Further, state legislation threatened to create local differences that would make it impossible to provide student-athletes with fair, uniform championships, and legislation at both levels threatened to materially alter the principles of college sports.

NCAA Federal and State Legislation Working Group

These legislative proposals necessitated conversations and agreements about how the membership should respond, and in May 2019, the NCAA Board of Governors appointed a Federal and State Legislation Working Group to examine this issue. Representing a diverse set of membership stakeholders, the 20-member working group was composed of student-athletes, presidents, faculty athletics representatives and athletics administrators from all three divisions, and included representation from each of the Division I conferences with autonomy (Atlantic Coast Conference, Big Ten Conference, Big 12 Conference, Pac-12 Conference and Southeastern Conference).

Specifically, the working group was directed as follows:

- a. Consider whether modifications to NCAA rules, policies and practices should be made to allow for NIL payments;
- b. Remain mindful that NIL payments must not be compensation for athletics participation; that paying students as employees for play is anathema to the NCAA mission focused on students competing against students; and that no legislation which permitted either of those outcomes should be considered;
- c. Assure that any proposed legislative solutions kept in mind that student-athlete benefits must be tethered to educational expenses or incidental to participation;
- d. Examine whether any modifications to allow for NIL payments, beyond what the U.S. Circuit Court of Appeals for the Ninth Circuit required in *O'Bannon* and other

court rulings, would be achievable and enforceable without undermining the distinction between professional sports and collegiate sports; and

- e. Preserve the Association's ability to sponsor or host fair interstate competitions and national championships.

The Board of Governors also charged the working group with producing a set of Association-wide principles to provide each division guidance in developing a consistent approach on legislation related to NIL payments.

Working Group Process

To fulfill its charge, the working group undertook an exhaustive study and review of the issue of student-athlete NIL, conducting four in-person meetings and 11 teleconferences between June 2019 and April 2020. As part of this process, the group considered extensive feedback and deliberated challenges and opportunities related to the ability of student-athletes to be compensated for the use of their NIL. The working group engaged a diverse group of stakeholders through in-person interviews, formal presentations and hundreds of pages of written feedback. Included among these stakeholders were current and former student-athletes, faculty, presidents, conference commissioners, athletics administrators and coaches from Divisions I, II and III, as well as thought leaders and experts in the higher education and college sports communities.

Presidential Subcommittee on Congressional Action

A topic that consistently emerged during the deliberations of the working group was the possibility that the Association's attempts to modernize its rules related to NIL could be deterred by state laws that purport to supersede NCAA rules or serial litigation which purports to undermine the ability of the NCAA to modernize its rules. To address this issue, and in response to the introduction of federal NIL legislation and interest by Members of Congress, in November 2019, the Board of Governors Executive Committee directed that a subcommittee of the working group be formed. The purpose of the subcommittee was to provide input on potential assistance that the Association should seek from Congress to support any efforts to modernize the rules in NCAA sports, while maintaining the latitude that the Association needs to further its mission to oversee and promote intercollegiate athletics on a national scale. The subcommittee conducted a total of seven meetings and teleconferences between December 2019 and April 2020. Its recommendations are included in the working group's final report.

Working Group Reports

The working group delivered an [initial report](#) to the Board of Governors on October 29, 2019, and requested an extension of its work through April 2020 to continue to gather feedback and work with the membership on the development and adoption of new NCAA legislation. The working group delivered its [final report](#) to the Board of Governors on April 29, 2020.

NCAA Board of Governors Actions

The NCAA Board of Governors unanimously supported the recommendations provided in the working group's October and April reports and promptly took action. On October 29, 2019, the board recognized that the Association must embrace change to provide the best possible experience for student-athletes and directed the three divisions to immediately begin the process of modernizing its rules to allow students participating in athletics the opportunity to benefit from the use of their NIL. The divisions were directed to, not later than January 2021, adopt new rules related to NIL consistent with the following guiding principles:

- Ensure student-athletes are treated similarly to nonathlete students unless a compelling reason exists to differentiate.
- Maintain the priorities of education and the collegiate experience to provide opportunities for student-athlete success.
- Ensure rules are transparent, focused and enforceable, and facilitating fair and balanced competition.
- Make clear the distinction between collegiate and professional opportunities.
- Make clear that compensation for athletics performance or participation is impermissible.
- Reaffirm that student-athletes are students first and not employees of the university.
- Enhance principles of diversity, inclusion and gender equity.
- Protect the recruiting environment and prohibiting inducements to select, remain at or transfer to a specific institution.

At its April 2020 meeting, the Board of Governors supported the working group's final recommendations and reinforced the importance of the divisions continuing to make significant progress on related rule changes. These rule changes, consistent with the guiding principles, should be adopted by January 2021 and effective no later than the 2021-22 academic year. The board highlighted that any modernization of the divisional NIL bylaws must be accompanied by guardrails to ensure that:

- Any compensation received by student-athletes for NIL activities represents a genuine payment for use of their NIL, and is not pay for athletics participation;
- Schools and conferences play no role in a student-athlete's NIL activity;
- Schools or boosters are not using NIL opportunities as a recruiting inducement;
- The role of third parties in student-athlete NIL activities is regulated; and
- Liberalization of NIL rules does not interfere with NCAA members' efforts in the areas of diversity, inclusion or gender equity.

Provided these guardrails could be established, the board supported the development of legislation by the divisions which permit student-athletes to receive compensation for use of their NIL in third-party endorsements; for the use of their NIL in their work product (including social media influencer activity, promotion of a business or work product or personal promotion); and to use agents, advisors or professional services in conjunction with the NIL activities, provided appropriate regulation is established.

Further, the Board of Governors supported the recommendations in the report related to the work of the Presidential Subcommittee on Congressional Action, including the NCAA's engagement with Members of Congress to seek preemption of state NIL laws, safeguard the non-employment status of student-athletes and establish a safe harbor to protect the Association against lawsuits filed for changes to name, image and likeness rules.

Next Steps and Implementation

Since the October directive by the Board of Governors, the three NCAA divisions have been working thoughtfully and expeditiously to develop legislative proposals that will allow student-athletes to benefit from the use of their NIL. Following the announcement, each division developed a working group which included student-athletes, athletics administrators and conference office staff to develop initial concepts related to NIL and solicit feedback from the broader membership. Since this time, the working groups and divisional governance bodies have undertaken widespread education and feedback efforts and are considering appropriate guardrails that would accompany any legislation, including a focus on pre-enrollment activity, parameters for institutional assistance and potential disclosure requirements. Formal legislative proposals related to NIL are expected to be introduced by November 1, 2020, voted on by January 2021 and effective at the start of the 2021-22 academic year.

A Pressing Need for Federal Partnership

The Association's ability to make meaningful reforms in the area of NIL is significantly undermined by impending state legislative action and outside legal factors, and underscores a compelling need for federal partnership on this issue.

Impediments Posed by State Legislation

As of the date of this testimony, 36 states have introduced bills which address the compensation of student-athletes for use of their NIL. This patchwork of state proposals includes bills with widely differing provisions and effective dates. Nearly all of the 36 bills expressly prohibit the NCAA and its member institutions from enforcing rules regarding the compensation of a student-athlete for their NIL, while some proposals under consideration would erode the NCAA's ability to maintain the collegiate model even further. Importantly, bills in California, Colorado and Florida have already passed into law and take effect as early as July 1, 2021.

A patchwork of state laws creates the very real possibility that NCAA members in different states will be governed by different rules related to NIL. This would prevent the NCAA from sponsoring sports and championships on a truly national level. It would also gravely undermine the ability of the NCAA's members to achieve their shared goal of providing fair and uniform competition to all student-athletes. These state laws have interstate consequences that make federal legislation far more appropriate.

Impediments Posed by Continuing Antitrust Litigation

The history of antitrust lawsuits brought against the Association over the last several decades reveals that federal antitrust law has frequently been used as a tool to attempt to change or undermine the Association's rules. While these lawsuits have, for the most part, been unsuccessful, the Association has been required to devote scarce and valuable resources to defending them, resources that could have been better spent on supporting student-athletes, as has been highlighted by the growing financial impact of the current global pandemic. Without appropriate protections, these antitrust challenges will continue - as evidenced by the most recent NIL class-action lawsuit filed against the Association on June 16 - and will interfere with the Association's ability to effectively and efficiently support the evolving needs of student-athletes.

For these reasons, it is appropriate and advisable for the Association to seek federal preemption over state NIL laws and safe harbor protection for its modernization efforts related to NIL.

Conclusion

I am proud of the experiences and opportunities that college sports provide to our country's student-athletes, particularly to those who might not otherwise have had the opportunity to earn a college degree. NCAA members have a long history of expanding these opportunities by progressively adapting to evolving student-athlete environments and adopting changes that support college athletes in a manner consistent with NCAA values and principles. It is critical that the Association continues to embrace change and adapt to the opportunities and needs of the 21st-century student-athlete.

While the Association has taken historic steps to enhance opportunities for student-athletes for the use of their name, image and likeness, the evolving legal and legislative landscape around these issues could not only undermine college sports as a part of higher education, but also significantly limit the NCAA's ability to meet the needs of college athletes moving forward. With this, I urge Congress to enact legislation that will provide a uniform name, image and likeness approach that will result in fair and uniform competition for all student-athletes and protect and ensure opportunities for future student-athletes.

I appreciate the Committee's continued and thoughtful interest in this issue and for the opportunity to share the work the NCAA Board of Governors has undertaken related to this issue. Thank you again and I look forward to answering any questions you might have.